(3)

No. 06-432

Supreme Court, U.S.
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In The

Supreme Court of the United States

JORGE HERNANDEZ-CASTILLO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONER'S REPLY BRIEF TO THE GOVERNMENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Government misrepresents the first two questions presented in Petitioner's Petition for a Writ of Certiorari. In Questions 1 and 2, Petitioner is not merely second-guessing the definition of a "crime of violence" in Sentencing Guidelines § 2L1.2. Rather, Petitioner is questioning the Tenth Circuit's cavalier presumptions of reasonableness within the Sentencing Guidelines and the chilling effect of the "two-step" review process established by *United States v. Kristl*, 437 F.3d 1050 (10th Cir. 2006), a decision entered by the Tenth Circuit Court of Appeals after the briefing in Petitioner's appeal, but nonetheless relied upon by the Tenth Circuit in determining Petitioner's appeal. These questions are important to the present case because the Tenth Circuit Court of Appeals found that the sentence imposed on Petitioner was unreasonable, but refused to rectify the situation because Petitioner did not brief the *Kristl* analysis.

Question No. 3 does raise the categorical approach to "consensual" statutory rape as a crime of violence.

ARGUMENT

In its Brief in Opposition at 7, the Government notes that the Fifth Circuit has recently had second thoughts about Texas' statute on sexual relations with a minor in *United States v. Alvarado-Hernandez*, 465 F.3d 188 (5th Cir. 2006), because of the "common-sense as well as a generic, contemporary definition of statutory rape." *Alvarado-Hernandez*, 465 F.3d at 189-190. The same circuit has also recently held that the Texas offense of sexual assault, on the other hand, does not qualify as a crime of violence because it does not require the use of force. *United States v. Luciano-Rodriguez*, 442 F.3d 320 (5th Cir. 2006). The year 2006 has raised new concerns in Texas about consensual sex.

This same year, the Ninth Circuit, in *Valencia v. Gonzales*, 439 F.3d 1046 (9th Cir. 2006), held that a Californian's unlawful sexual intercourse with a person younger than eighteen was not a crime of violence for purposes of 18 U.S.C. § 16 because the statute did not require actual lack of consent by the minor. An enhancement under Sentencing Guidelines § 2L1.2, however, might be applicable because the 2003 amendments specifically list "statutory rape" as a crime of violence. *Valencia*, 439 F.3d at 1053, *dicta*.

The Ninth Circuit, in *United States v. Lopez-Solis*, 447 F.3d 1201 (9th Cir. 2006), on the other hand, refused to apply the statutory rape designation in Sentencing Guidelines § 2L1.2 to a Tennessee statute proscribing sex with a minor because the 2003 amendments to § 2L1.2 were not in effect at the time of the prior offense in 2002. Petitioner's prior offense occurred in 1998.

The very limitations and confusions concerning "consensual" teenage sex which are presented in the government's Brief in Opposition indicate the need to apply Part II of *Booker v. United States*, 543 U.S. 220 (2005), more liberally in this area of law. Contrary to *Alvarado-Hernandez*, 465 F.3d at 189-190, statutory rape is neither a "contemporary" nor a "generic" concept. The historical analysis of the common law offense of statutory rape concluded that female minors were incompetent to give consent to sexual intercourse, and, therefore, any sexual intercourse with such females was rape, as a matter of law. There is no such thing as "consensual" statutory rape. Modern laws proscribing "unlawful sexual intercourse with persons under eighteen" are an attempt to compromise between protecting minors from sexual abuse and de-criminalizing teenage sexual activities. As demonstrated by the cases cited above, the compromise is not always consistent or logical.

In the present case, the Tenth Circuit Court of Appeals recognized that the present case was one "where an exercise of *Booker* discretion could mitigate a sentence . . ." *United States v. Hernandez-Castillo*, 449 F.3d 1127, 1132 (10th Cir. 2006). Contrary to the government, petitioner's challenge is not "untimely." The *Kristl* "two-step" application of *Booker*, as well as the 2006 dialogue on criminal convictions for consensual teenage sex all occurred after appellate briefing was completed in December 2005.

CONCLUSION

Petitioner requests this Court to take the opportunity to provide more explicit, non-presumptive standards for the consideration of the reasonableness of a sentence and to straighten out the confusion concerning the fictional violence in criminally sanctioned consensual sex.

This Court should grant the petition for a writ of certiorari and reverse the decision of the Tenth Circuit Court of Appeals.

Respectfully submitted,

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